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Article 5

Constitutional Law - Fair Trade Act - Right of Manufacturer, Wholesaler, or Producer to Control the Resale Price of Trademarked or Branded Commodities

Robert J. Buer

RECENT DECISIONS

BANKRUPTCY—JURISDICTION UNDER SECTION 77B—PROPERTY OF THE DEBTOR.—The debtor, a steamship company, had purchased seven steel cargo vessels from the United States in 1928. The company paid part of price at the time of purchase and agreed to pay the balance over a period of years. In 1929 the company contracted with the United States Shipping Board to carry ocean mail. In 1933 the company defaulted on the payment of installments. The Board arranged to credit the amounts due for carrying to the unpaid purchase price. In January 1936 the company filed a petition for reorganization under Section 77B in the bankruptcy court in the Western District of Washington. The petition was approved on the same day and the debtor was authorized to carry on its business. The Secretary of Commerce notified the debtor that the credit arrangement of the Shipping Board had been rescinded. Before filing the petition the debtor had notified the Post Office Department that certain voyages had been completed. The debtor had demanded two sums each one over $14,000. The government officials refused to pay. The debtor then filed a petition setting out the above facts and alleged that it must have the sums due on the 1935 contracts if it was to continue in business. At the same time an order to show cause was entered directing the sums to be paid or that the United States and certain government officials appear before the court and show cause why the payments should not be made. Special motions were filed by the United States and by the officials concerned in which they objected to the jurisdiction of the court and in which the individuals contended that they had never been served with process in the particular district. The bankruptcy court denied the motion of the United States to dismiss and directed all the defendants except the United States to pay the accrued and the future earnings under the contract. On appeal, by leave of the bankruptcy court, *held,* order reversed and the bankruptcy court ordered to dismiss the petition against the United States and to set aside the service upon the individuals; the claim to the fund already appropriated but still to be paid out is not "property" of the debtor. *United States* v. *Tacoma Oriental S. S. Co.,* 86 F. (2d) 363 (C.C.A. 9th, 1936).

Under Section 77B (a) the bankruptcy court has jurisdiction of the debtor and its property wherever located. 48 STAT. 912 (1934), 11 U.S.C.A. § 207 (a) (1936). In *Continental Bank* v. *C. R. I. & P. Ry. Co.,* 294 U.S. 648, 55 Sup. Ct. 595, 79 L.ed. 1110 (1935) the Supreme Court held that a similar provision in Section 77 [47 STAT. 1474, 11 U.S.C.A. § 205 (a) (1933)] gave the bankruptcy court with which the petition had been filed power to enjoin the sale of pledged collaterals belonging to the debtor and held by creditors who resided outside the district and who had not voluntarily submitted to the jurisdiction of the court. In a proceeding under Section 77B the Circuit Court of Appeals in the Second Circuit upheld the power of the bankruptcy court in a New York district to order a receiver appointed by a court in Georgia for properties located in that state to turn those properties over to the trustees appointed for the debtor by the New York bankruptcy court. *In re Greyling Realty Corporation,* 74 F. (2d) 734 (C.C.A. 2nd, 1935). The court pointed out in that case that the bankruptcy court must order notice of the hearing to be served in some manner which will insure adequate protection to the party summoned. See also *In re Midland United Co.,* 12 F. Supp. 502 (D. Del. 1935); *In re Norfolk Weavers,* 12 F. Supp. 494 (D. Del. 1935). The bankruptcy court in the Western District of New York directed service to be made by trustees appointed for a debtor in a 77B proceeding upon former directors and stockholders of the debtor then resident in Michigan in an "independent suit" to recover misappropriated moneys, and the court denied the motions of the "defendants" to quash the service. *Thomas* v. *Winslow,* 11 F. Supp. 839 (W.D.N.Y. 1935). The court in the instant case did not approve of the decision in *Thomas* v. *Winslow, supra.* The court in the principal case pointed out that the debtor or the debtor's trustees might have to proceed by way of a plenary suit against adverse parties and that the provision in Section 77B about jurisdiction would not help the primary court in those cases. The court felt that the obligation in this particular case was contractual even though the appropriation had been authorized.

In no one of these cases on jurisdiction under Section 77B was the question of sanction considered. In the *Rock Island* case there was sanction behind the order of the court in that the holders of the collaterals without further protest would have to accept their position in the reorganization plan which the bankruptcy court might confirm. But in a case like *In re Greyling Realty Corporation, supra,* if the Georgia receiver would refuse to obey the order of the New York bankruptcy court it would seem that any process such as citation and imprisonment for contempt would have to issue out of the Georgia federal court as an ancillary bankruptcy court. The district in which the petition has been filed may not be that in which the reorganization can best be supervised but it is with the discretion of that court if it has approved the petition to retain or relinquish supervision providing of course that the debtor had its principal place of business or its principal assets in the particular district during the greater part of the preceding six months or was incorporated in the state of which the district is a part. *Hamilton Gas Co.* v. *Watters,* 75 F. (2d) 176 (C.C.A. 4th, 1935) (where the creditors had filed a petition in one district and where the debtor had filed a petition in another district in which the petition was first approved and where the court held that the debtor may choose the district providing it is one of those covered by the general jurisdiction provisions of the statute); *In re Hamilton Gas Co.,* 79 F. (2d) 97 (C.C.A. 2d, 1935) (involving the same debtor and where the appellate court directed the court which had first approved the petition to dismiss the proceding because the debtor had neither its principal place of business nor its principal assets in the particular district for the greater part of the six month period preceding the filing of the petition); *Hamilton Gas Co.* v .*Watters,* 79 F. (2d) 438 (C.C.A. 4th, 1935) (involving the same debtor and where the appellate court affirmed the order approving the petition by that court in which the creditors had first filed); see also *In re Kelly-Springfield Tire Co.,* 11 F. Supp. 839 (W.D.N.Y. 1935); *cf.* § 32 of the Bankruptcy Act, 30 STAT. 554 (1898), 11 U.S.C.A. § 55 (1926), and § 77B (a), *supra* ("* * * The court shall upon petition transfer such proceedings to the territorial jurisdiction where the interests of the parties will best be subserved. * * *).

VERNON X. MILLER.

CONSTITUTIONAL LAW—FAIR TRADE ACT—RIGHT OF THE MANUFACTURER, WHOLESALER, OR PRODUCER TO CONTROL THE RESALE PRICE OF TRADEMARKED OR BRANDED COMMODITIES.—These are two suits brought to enjoin the defendant retailers from offering for sale and selling certain trademarked and branded goods at less than the price fixed by the plaintiff wholesalers. The facts in the two actions are similar. The State of Illinois has adopted the so-called Fair Trade Act which, in effect, authorizes the producer, wholesaler, or manufacturer of a trademarked or branded commodity which is in fair and open competition with commodities of the same general class produced by others to enter into a contract with the buyer of such a commodity which contract may provide: "(1) That the buyer will not resell such commodity except at the price stipulated by the vendor; (2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee." Section 2 of this Act provides: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract ,is unfair competition and is actionable at the suit of any person damaged thereby." ILL. STAT. (Smith-Hurd, 1935) c. 121½ § 188 *et seq.*; ILL. REV. STAT. (1935) c. 140, § 8 *et seq.* The plaintiff is a wholesale dealer in alcoholic beverages, and it buys certain branded and trademarked whiskies from producers; the whiskies in question are in fair and open competition with goods of the same general class manufactured by others. Defendant corporation operates retail liquor stores in the city of Chicago. The plaintiff has never sold its products to the defendant, nor has there ever been any contractural relation between the two parties. But plaintiff has sold its whiskies to other wholesalers in Chicago and has entered into price-fixing contracts with them pursuant to the above Act. There is sufficient evidence in the record to show that the defendant had knowledge of the price fixed in these contracts, but wilfully sold the trademarked whiskies in question at a price below that fixed by the plaintiff. Plaintiff shows as injury a diminution in its sales and that other retailers have threatened to discontinue the plaintiff's product unless the price-cutting practice of the defendant is stopped. Decrees for the plaintiffs in both cases. The decrees were affirmed by the Supreme Court of Illinois. *Joseph Triner Corp* v. *McNeil,* 363 Ill. 559, 2 N.E. (2d) 929, 104 A.L.R. 1435 (1936); *Seagram-Distillers Corp.* v. *Old Dearborn Distributing Co.,* 363 Ill. 610, 2 N.E. (2d) 940 (1936). On appeal to the United States Supreme Court, *held,* decrees affirmed. The price-fixing provisions of the Fair Trade Act is not a violation of the due-process clause, nor of the equal-protection clause of the Constitution. U. S. CONST. Amend. 14, § 1. The essence of the Act is to protect the property of the producer in trademarked goods, that is, the good will which the public holds toward his product. Further, there is no denial of the equal protection of the laws because the branded goods affected by the Act must be in free and open competition with other goods of the same general nature produced by others. *Old Dearborn Distributing Company* v. *Seagram-Distillers Corp.; McNeil* v. *Joseph Triner Corp.,* 57 Sup. Ct. 139 (1936).

At common law the right of the producer of branded or trademarked goods, which are in free and open competition with goods of similar nature manufactured and sold by others, to contract with his vendee in regard to a fixed resale price of such goods has never been denied, but the producer's remedy against a retailer who cut the price of his commodity was given solely upon the contract. *Grogan* v. *Chaffee,* 156 Cal. 611, 105 Pac. 745 (1909) (wherein a contract fixing the price of branded olive oil was upheld); *D. Ghirardelli Co.* v. *Hunsicker,* 164 Cal. 355, 128 Pac. 1041 (1912) (wherein a notice upon a package of branded ground chocolate to the effect that the same was accepted by the wholesaler or retailer on the express condition that he would not sell it at a price lower than there stipulated was construed as a contract and enforced against a retailer who had not bought directly from the plaintiff but from a wholesaler); *Fischer Flouring Mills Co.* v. *Swanson,* 76 Wash. 649, 137 Pac. 144 (1913) (wherein a contract fixing the resale price of branded flour was construed as ancillary to the contract of sale and was enforced against the defendant vendee). The reason for the rule is stated to be the protection of the manufacturer who is injured by the retailer's action in cutting prices while the retailer suffers no loss thereby because he may recoup such loss by the increase in sales caused by the cut price. *Fischer Flouring Mills Co.* v. *Swanson,* 76 Wash. 649, 668, 137 Pac. 144, 151 (1913). However, the right to fix the resale price by contract does not extend to patented articles or to articles manufactured under a secret formula because in those cases the field of competition is clearly limited to those persons handling that particular article. *Waltham Watch Co.* v. *Keene,* 202 Fed. 225 (S.D. N.Y. 1913), *affirmed,* 232 U.S. 724 (1913); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373, 31 Sup. Ct. 376, 58 L.ed. 192 (1910). Now, the proposition to be considered is: where the manufacturer, wholesaler, or producer of trademarked or branded goods, which are in fair and open competition with similar articles manufactured by others, has a contract or a series of contracts with the purchasers of such articles which contracts fix the resale price of the goods, may he, by the very fact that the articles are trademarked or branded, enforce such price regulation against a retailer who handles his article, cuts the price, but who has no contractural relation with him? Before the enactment of the Fair Trade Act in various jurisdictions the answer to this question was in the negative. The manufacturer, wholesaler, or producer of trademarked or branded goods cannot, without statutory aid, control the resale price of such articles in the hands of a retailer with whom he has no contractual connection. *Coty, Inc.* v. *Hearn Department Stores, Inc.,* 284 N.Y. Supp. 909, 926 (1935). However, a manufacturer could always refuse to sell his product to a retailer who cut prices. *United States* v. *Colgate & Co.,* 250 U.S. 300, 39 Sup. Ct. 465, 63 L.ed. 992 (1919); *State of Washington* v. *C. B. Scallard,* 126 Wash. 335, 218 Pac. 224 (1923). But *cf. Federal Trade Comm.* v. *Beech-Nut Packing Co.,* 257 U.S. 441, 42 Sup. Ct. 150, 66 L.ed. 307 (1921).

For many years it has been the policy of government to promote free competition by enacting laws preventing the formation of trusts and monopolies, the so-called anti-trust laws of the various state and Federal governments. *Joseph Triner Corp.* v. *McNeil,* 363 Ill. 559, 2 N.E. (2d) 929 (1936). But various states, including New York, California, New Jersey, Illinois, and Wisconsin, have recently deemed it wise to modify such policy, and so they have enacted Fair Trade Acts. California: Laws (1931) p. 583, *amended,* Laws (1933) p. 793; Illinois: ILL. STAT. (Smith-Hurd, 1935) c. 121½, § 188; New Jersey: N. J. ANN. STAT. 1935, §§ 217-13 to 217-17; New York: Laws (1935) c. 976; Wisconsin: WIS. STAT. (1935) § 133.25. The economic theory behind the Acts has been stated to be the protection of the manufacturer's property right in the goodwill towards his product which has been produced and kept by never selling the article below a stipulated price, and it has been declared sound policy to protect that property right against destruction by others whose only interest in such right is to use it to deceive the public. *Joseph Triner Corp.* v. *McNeil, supra.* The Wisconsin Legislature has stated the intent of the act to be the safeguarding of the public "against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices under which fair and honest competition is destroyed or prevented." WIS. STAT. (1935) § 133.27. The California Supreme Court has declared in favor of the policy of the Act, that price cutting in time will adversely affect public interest, and that the public will be adequately protected against unreasonable prices because the Act does not prevent fair and open competition between manufacturers of similar products. *Max Factor & Co.* v. *Kunsman,* 5 Cal. (2d) 446, 55 P. (2d) 177 (1936), *aff'd.* under the doctrine of the principal case, 57 Sup. Ct. 147 (1936). The Fair Trade Act, in effect, permits the manufacturer, wholesaler, or producer of trademarked or branded articles to control the resale price of such goods in the hands of a retailer with whom he has no contractual relation; it further permits such manufacturer a remedy against such retailer for his cutting of the stipulated resale price. So, clearly, the Fair Trade Act is a legislative choice of economic policy. The courts have plainly indicated that it is a legislative and not a judicial function to make such a choice of policy, and that the only purpose of judicial review is to determine whether the subject of the legislation is within the power of the state to act upon, and if it is, whether the means adopted to promote such policy are constitutional. *Max Factor & Co.* v. *Kunsman, supra; Nebbia* v. *New York,* 291 U.S. 502, 54 Sup Ct. 505, 78 L.ed. 940 (1933); *Coty, Inc.* v. *Hearn Department Stores, Inc.,* 284 N.Y. Supp. 914 (1935). The Act has been attacked in various jurisdictions on five constitutional grounds; they are: (1) that the Act is an unconstitutional attempt to regulate interstate commerce; (2) that the statute is so indefinite, vague, and incomplete that a person of ordinary intelligence must guess at its meaning, and it is therefore unconstitutional as being a denial of due process; (3) the Act, in that it allows a private individual to fix the price by contract, is an unlawful delegation of legislative power to such individual in violation of the state constitution granting such power to the legislature; (4) the Act is a denial to the owner of property of the equal protection of the law in that it is arbitrary and unreasonable in its classification; (5) the Act is a violation of the due-process clause of the Fourteenth Amendment of the Constitution because every owner of property has the right to determine for himself at what price he will sell it. Because the Fair Trade Act, at best, can only be construed as applying to transactions within the state where passed, the first objection that the Act is an unconstitutional attempt to regulate interstate commerce fails. *Max Factor & Co.* v. *Kunsman,* 5 Cal. (2d) 446, 55 P. (2d) 177, 197 (1936). The second objection that the statute is indefinite, vague, uncertain and incomplete and that a person of ordinary intelligence would be compelled to guess at its meaning and that therefore the Act is a denial of due process has been disposed of in the instant case, both in the state court of last resort and in the United States Supreme Court on appeal, as being of no value; the Illinois Court said that when the general phrases used have a technical or special meaning well enough known "to enable those within their reach to correctly apply them," then the Act is sufficiently certain. *Joseph Triner Corp* v. *McNeil,* 363 Ill. 559, 2 N.E. (2d) 929, 939 (1936). The third objection that allowing a private individual the right to fix prices is an unlawful delegation of the legislative power and that therefore the Act is contrary to the state constitution which vests such power in the legislature is of considerable weight. The New York Supreme Court seized upon this argument to declare the New York Fair Trade Act invalid. *Coty, Inc.* v. *Hearn Department Stores, Inc., supra.* The New Jersey Court of Chancery follows the reasoning in the *Coty* case and declares its Fair Trade Act unconstitutional on the ground that it is an unconstitutional delegation of legislative authority to individuals without definite policy and rule of action. *Johnson & Johnson* v. *Weissbard,* (N.J. 1936) 184 Atl. 783. The New York Court of Appeals apparently affirms this doctrine in a later case, saying further that the articles there in question (books) were not affected with a public interest and that therefore even the legislature would not have the power to fix the prices of these commodities much less delegate such power to a private individual. *Doubleday, Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N.Y. 272, 199 N.E. 409 (1936). The Illinois court attempts to distinguish the *Doubleday, Doran* case on the ground that the books there in question were not "commodities" within the meaning of the Act. *Joseph Triner Corp.* v. *McNeil,* 363 Ill. 559, 2 N.E. (2d) 929, 936 (1936). But the distinction is evidently of no value, because the New York Court of Appeals reaffirms its stand in a later case apparently dealing with a different class of goods. *Seeck & Kade* v. *Tomshinsky,* 269 N.Y. 613, 200 N.E. 23 (1936). The California court sustains the Fair Trade Act in its authorization of price-fixing contracts on the ground that such provision may be authorized under the police power of the state, saying that such power is not limited to the protection of life, safety, health and morals of its citizens, but that such power may extend to the promotion of public convenience and general prosperity; that therefore state legislation may authorize control of the resale price of commodities, even though such goods are not affected with a public interest, if the trade practice involved interferes with public convenience and general prosperity. The court distinguishes the *Doubleday, Doran* case on three grounds: (1) that the contract fixing the price in that case was between the producer and its subsidiary, *"a contract between themselves;"* (2) that the producer there was not obliged to sell to the defendant retailer, but that he did so voluntarily without exacting from such retailer a contract to maintain the price of the article sold; (3) that only one contract existed in that case. *Max Factor & Co.* v. *Kunsman, supra.* It is submitted that the reasoning in the Max Factor case best answers the contention that the Fair Trade Act is an unconstitutional delegation of legislative power. The fourth objection that the Act is a denial of the equal protection of the laws in that it gives producers of trademarked goods an advantage over producers of unidentified commodities is of no consequence. The principal case answers the objection in this way: the equal-protection clause does not prevent a state from making a reasonable classification for the purposes of legislation; the Act treats all persons similarly situated, that is, all producers of branded goods, alike; that is all that this clause of the Constitution demands. It is submitted that to date no case has declared the Act unconstitutional on this ground. The fifth objection is, of course, the most potent. No court denies the power of the legislature to fix prices of commodities which are affected with a public interest, or where the regulation is necessary because of public emergency, or where price maintenance is a necessary adjunct to the reasonable exrcise of the state's police power. *Johnson & Johnson* v. *Weissbard, supra; Coty, Inc.* v. *Hearn Department Stores, Inc., supra.* The contention made is that the situation dealt with in the Fair Trade Act does not come within any of these exceptions, and that therefore the authorization given by the Act to price regulation is an unconstitutional taking of liberty and property of the defendant retailer without due process of law. The decisions in the *Max Factor* case and in the instant case, both in the state courts and in the United States Supreme Court, clearly negative this contention. To reiterate the reasoning: the regulation that the Fair Trade Act permits is justified on the ground that it is within the power of the legislature to protect the property of the producer of trademarked or branded goods, that is, the good will and the producer's contract right, and the price-fixing clause is an appropriate means to that end.

ROBERT J. BUER.